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NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

DOUGLAS OAKES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

JAMES M. SHANNON*
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

John Pappalardo
Deputy Attorney General
Madelyn Wessel
Assistant Attorney General

One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-4538

*Counsel of Record

QUESTION PRESENTED

Whether possible application of a criminal statute designed to prevent the sexual abuse and exploitation of children, to marginal conduct arguably protected by the First Amendment, justifies invalidation of the entire statute on overbreadth grounds and reversal of respondent's conviction without deciding whether the respondent's actions were within the statute's substantial legitimate reach.

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COMMONWEALTH OF MASSACHUSETTS,

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v.

DOUGLAS OAKES,

Respondent.

Petition for a Writ of Certiorari
to the Supreme Judicial Court for
the Commonwealth of Massachusetts

The petitioner, Commonwealth of Massachusetts, hereby petitions this Court for a writ of certiorari to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

OPINION BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 401 Mass. 602, 518 N.E.2d 836 (1988), and is reproduced here in the Appendix at 1.

JURISDICTION

The Opinion and Order of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on February 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

The relevant sections of Chapter 272 of the General Laws of Massachusetts provide:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages,

or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purposes of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.

It shall be a defense in any prosecution pursuant to this section that such visual presentation or reproduction of any posture or exhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library.

Mass. Gen. Laws Ann. c.272, §29A (West Supp. 1987).1/

1/ Section 29A was amended by St. 1987, c.294, §1 to include "any live performance," an amendment which does not apply to this case. See also, Commonwealth v. Oakes, 401 Mass. 602, 603 n.1., 518 N.E.2d 836, 837 n.1 (1988).

As used in sections twenty-eight, twenty-eight C, twenty-eight D, twenty-eight E, twenty-nine, twenty-nine A, twenty-nine B, thirty and thirty D, the following words shall, unless the context requires otherwise, have the following meanings: . . .

"Nudity", uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area. . . .

Mass. Gen. Laws Ann. c.272, §31 (West Supp. 1987).

STATEMENT OF THE CASE

On Janury 9, 1985, respondent Douglas Oakes ("Oakes") was indicted by a Worcester County grand jury for "soliciting a child to pose for pornographic purposes" in violation of Mass. Gen. Laws Ann. c.272, Section 29A (West 1987). The indictment arose out of photographs which were taken in January 1984 of Oakes' then fourteen year old stepdaughter. (Trial Tr. at 22, 24-26.)

On March 21, 1985, Oakes filed motions to dismiss the indictment challenging its constitutionality, and requesting a report[2/] to the Appeals

2/ Under Mass. R. Crim. P. 34, a trial judge may report an important or doubtful question of law to the Appeals Court for decision.

Court of Massachusetts. Both of these motions were denied by a judge of the Superior Court in an unreported memorandum and order.

On October 10, 1985, Oakes was tried before a jury. Testimony by three witnesses -- Oakes, his stepdaughter and his ex-wife -- revealed that Oakes took numerous photographs of his stepdaughter, then fourteen years of age. (Trial Tr. at 22, 24, 30). At first, Oakes photographed her in casual clothing and body suits. (Trial Tr. at 24). He also photographed his stepdaughter in outfits purchased at "Fredericks of Hollywood." (Trial Tr. at 65-67).

In February of 1984, when no other member of the family was present, Oakes posed his stepdaughter in various

positions on a bar in the family room, clothed only in bikini underpants and with a scarf draped around her neck. (Trial Tr. at 24-26). When the girl later saw the photographs, she ripped them up and threw them in the woods. (Trial Tr. 26-27). When Oakes found out about this, he made her return to the woods and retrieve the pictures. (Trial Tr. at 27).

These photographs were subsequently hidden in a false ceiling in the basement of the house. (Trial Tr. at 34, 36). Where they were ultimately discovered, the girl's mother took them to the police. (Trial Tr. 36, 50). Oakes denied taking the photographs. (Trial Tr. at 57, 58).

Oakes was found guilty of the offense charged and appealed to the

Appeals Court of Massachusetts. His appeal was transferred to the Supreme Judical Court on its own initiative in accordance with Mass. Gen. Laws Ann. c.211A, §10 (West Supp. 1987). The case was argued in the Supreme Judicial Court on February 3, 1987. On February 1, 1988, the full court, in a four to three decision, reversed Oakes' conviction and dismissed the indictment. The majority reasoned that photography is expression entitled to First Amendment Protection. Because §29A could be construed to criminalize conduct the majority viewed as clearly lawful, such as a parent's photographing of a naked one year old child on a beach, the majority found the statute to be fatally overbroad. The majority therefore struck down the statute in its entirety, without

determining whether Oakes' conduct could properly be criminalized.

The three dissenting judges concluded that §29A regulates conduct and not expression, and that the majority erred in applying a First Amendment overbreadth analysis to the case. The dissenters were of the view that the statute embodied the Commonwealth's legitimate interest in protecting children from sexual abuse and exploitation, and that, as applied to Oakes, the statute bore a reasonable relation to this legitimate legislative objective.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S FIRST AMENDMENT SUBSTANTIAL OVERBREADTH DOCTRINE AS ESTABLISHED IN BROADRICK AND FERBER

In the decision under review, the Supreme Judicial Court invalidated the Massachusetts child pornography production statute on facial overbreadth grounds. The Court did so without examining whether the statute addressed a central core of constitutionally regulable criminal conduct, or whether Oakes' conduct in the case could be constitutionally prohibited. This decision conflicts with this Court's requirement that First Amendment overbreadth invalidation be viewed as a drastic remedy, appropriate only where a statute's infringement on expression is substantial in relationship to its

legitimate sweep. New York v. Ferber, 458 U.S. 747 (1982); Broadrick v. Oklahoma, 413 U.S. 601 (1973); see Section A, infra. The ruling below conflicts with the decision of this Court in Ferber and with decisions of other federal and state courts finding the production and distribution of child pornography to be constitutionally prohibitable criminal conduct. See Section B, infra. For these and other reasons more fully set forth below, the writ should be granted.

A. First Amendment Overbreadth Is A Drastic Remedy To Be Applied Only When Infringements On Expression Are Substantial.

The First Amendment overbreadth doctrine is an exception to the general rule that a person to whom a statute may constitutionally be applied may not be

heard to challenge it on the grounds that it might conceivably be unconstitutionally applied to others in cases not before the court. New York v. Ferber, 458 U.S. at 767; Broadrick v. Oklahoma, 413 U.S. at 610.

Beyond this "standing" component, the overbreadth doctrine also expresses a substantive constitutional standard for determining the validity of a statute affecting expression. See Monaghan, Overbreadth, 1981 S.Ct. Rev. 1, 3. Overbreadth used in this sense describes a challenge "to a statute that in all its applications directly restricts protected first amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." Secretary of State of Maryland

v. J. H. Munson Co., 467 U.S. 947, 965-66, n.13 (1984) (emphasis added).

Because the impact of the overbreadth doctrine can be devastating, leading, as in the present case, to total invalidation of a statutory scheme of profound importance to a state, this Court has made clear its view that the doctrine is "strong medicine" to be used "only as a last resort." Broadrick, 413 U.S. at 613, quoted in Ferber, 458 U.S. at 769.

For this reason, "'[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.'" Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982) quoted in

City of Houston, Texas v. Hill, ___ U.S. ___, ___ 107 S.Ct. 2502, 2508 (1987).

Moreover, where conduct as well as speech is involved, this Court has made clear that the overbreadth of a statute must be substantial "judged in relation to the statute's plainly legitimate sweep." Id. Facial invalidation is an inappropriate "cure" for potential marginal infringements of First Amendment values, where "'the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'" Ferber, 458 U.S. at 771, n.25, quoting from CSC v. Letter Carriers, 413 U.S. 548, 580-81 (1973).

"Substantial overbreadth" is thus "a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that

it might be applied in an unconstitutional manner." Munson, 467 U.S. at 964. This requirement derives from the very nature and purpose of the overbreadth doctrine: "While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." Ferber, 458 U.S. at 772.

Where the statute is aimed at criminal conduct, concern over its potential chilling effect diminishes even further. As this Court explained in Broadrick, the limited role of the overbreadth doctrine:

> attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. at 615.

B. Massachusetts General Laws Chapter 272 Section 29A Regulates A Central Core Of Criminal Conduct And Reflects The Commonwealth's Compelling Interest In Preventing Child Sexual Abuse.

The foregoing makes clear that the key inquiry in an overbreadth challenge to a state criminal statutory scheme is

whether the statute describes a "central core of constitutionally regulable conduct." Ferber, 458 U.S. at 771, n.26. As this Court established in Ferber, a state statutory scheme that focuses on the production or dissemination of child pornography easily passes muster under such an inquiry. Cf. City of Houston v. Hill, ___ U.S. at ___, 107 S.Ct. at 2508 (statute invalid which dealt not with core criminal conduct but with constitutionally protected speech).

This Court already has noted that "virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combatting 'child pornography.'" Ferber, 458 U.S. at 758. The fact that the production of child pornography has been made "illegal

throughout the Nation," Ferber, 458 U.S. at 761, reflects the uniform legislative and medical judgment that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." Id. at 758. Indeed, this Court has stated that the constitutionality of laws prohibiting the use of children in the production of pornographic films and photographs "has not been questioned," and that "enforceable production laws would leave no child pornography to be marketed." Id. at 762. Because of the state's compelling interest in preventing the sexual abuse and exploitation of children and for other reasons, Ferber established that states are entitled to greater leeway in the regulation of

pornographic depictions of children than might be appropriate in other contexts. Id. at 757.[3/]

Other courts that have reviewed statutes designed to prevent the sexual abuse and exploitation of children through their use in the production of child pornography have uniformly considered those statutes to be production laws, easily capable of withstanding attacks on First Amendment

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3/ Indeed, the Ferber court cited to Section 29A in including Massachusetts among the twenty states which had prohibited the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene. Id. at 749, n.2.

grounds.[4/]

In examining such statutes, courts have reasoned that "the activity engaged in by the defendant and prohibited by the statute is distinctly conduct as contrasted with speech. . . ." State v. Helgoth, 691 S.W. 2d 281, 284 (Mo.

4/ See, e.g., State v. Helgoth, 691 S.W. 2d 281 (Mo. 1985) (defendant's habeas petition on similar grounds rejected in 640 F.Supp. 1251 (E.D. Mo. 1986)); Payne v. Commonwealth, 623 S.W.2d 867, 872 (Ky. 1981), cert. denied, 456 U.S. 909 (1982); Griffin v. State, 396 So.2d 152 (Fla. 1981); People v. Folk, 109 Misc.2d 738, 440 N.Y.S.2d 984 (1981). See also United States v. Smith, 795 F.2d 841, 845 (9th Cir. 1986) (interpreting 18 U.S.C. §2251(a) (Supp. 1984) which makes illegal the inducement of children into sexual conduct for the purpose of creating visual depictions of that conduct); United States v. Reedy, 632 F. Supp. 1415, 1416 (W. D. Okla. 1986) (18 U.S.C. §2251(a) (Supp. 1984) not unconstitutionally vague or overbroad where defendant photographed his daughter and her girlfriend in the nude).

1985). Similarly, the Supreme Court of Kentucky stated its view that: "The courts clearly distinguish statutes protecting a minor from actual use in a sexual performance. Such conduct does not give rise to the same special free speech protection given the film or other media." Payne v. Commonwealth, 623 S.W.2d 867, 871 (Ky. 1981). Accord, United States v. Reedy, 632 F.Supp. 1415, 1418-19 (W.D. Okla. 1986) ("Regulations governing activities of distributors of child pornography may be viewed with greater constitutional scrutiny than those regulating activities of coercers and producers, because the latter are considered to regulate primarily conduct and only incidentally speech.")

The Massachusetts child pornography statute invalidated in this case, states in relevant part:

> Whoever. . . hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture, shall be punished. . . .

Mass. Gen. Laws Ann. Ch. 272, §29A (West Supp. 1987).

The statute is directed toward the use of children in the production of pornography. Indeed, the indictment of Oakes was for "soliciting a child to pose for pornographic purposes." This Court's Ferber decision, as well as the great weight of authority from the lower federal courts and state courts, make

clear that the behavior essentially prohibited by Section 29A is criminal conduct which all states have a vital and constitutionally legitimate interest in preventing.

C. The Supreme Judicial Court Incorrectly Invalidated An Entire Criminal Statutory Scheme And Reversed Oakes' Conviction Because Marginal Applications Might Infringe On Speech Interests.

The Supreme Judicial Court struck down an entire criminal statute, vital to the state's interest in preventing child sexual abuse, on the grounds that an application of the child pornography statute to conduct the court viewed as clearly lawful, such as parental pictures of very young naked children running on the beach, was conceivable. Oakes, 401 Mass. at 605, 518 N.E.2d at

838. It is noteworthy in this regard that not a single application of the statute to this type of situation has ever been presented, and that the chilling effect feared by the majority is unlikely where, as the majority noted, "virtually every person would regard" the activity as lawful. Id., 518 N.E.2d at 838.

More importantly, the four-to-three majority's invalidation of the statute reflects a fundamental misunderstanding of the principle that "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. (See section A infra).

The question is not, as the Oakes majority conceived it, whether the statute is susceptible to a troubling

application, or set of applications, but rather whether "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." Ferber, 458 U.S. at 773.[5/] The court below erroneously failed even to consider whether Section 29A defined a "central core of

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5/ As other courts have construed the post-Ferber substantial overbreadth requirement, it is immaterial if a statute may conceivably reach some instances of protected speech. "Defendant may be correct in saying that the literal language of the statute could be interpreted to embrace some protected speech, but this does not suffice to overturn a statute. There is no substantial overbreadth." United States v. Rogers, 755 F.2d 533, 543 (7th Cir.), cert. denied 473 U.S. 907 (1985); United States v. Reedy, 632 F.Supp. at 1421 (court rejected argument that 18 U.S.C. §2551(a) (Supp. 1984) is substantially

constitutionally regulable conduct." Ferber, 458 U.S. at 771, n.26.

In Ferber, this Court corrected a similar error by the New York Court of Appeals which had invalidated New York's child pornography legislation out of

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Footnote continued:

overbroad, even if some protected scientific or artistic expression is affected by statute); see People v. Holder, 96 Ill.2d 444, 454, 451 N.E.2d 831, 835 (1983) ("[A]ny such conceivable impermissible applications are dwarfed by the statute's legitimate reach in prohibiting threatened criminal activity."); State v. Lance, ___ Mont. ___, ___, 721 P.2d 1258, 1265 (1986) ("Although it might be possible that some rare situations will arise in the future,.... those possible unconstitutional applications of the statute are not sufficient to invalidate it on its face.").

concern that "some protected expression, ranging from medical textbooks to pictorals in the National Geographic would fall prey to the statute." Id. at 773. Despite expressing sympathy with the state court's concern in this regard, this Court held that any such potential overbreadth should be "cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Id. at 774.

In its short decision in this case, the Supreme Judicial Court four times indicates its view that whether Oakes could constitutionally be punished for his actions is an unresolved

question.[6/]

In failing to determine whether the statute could constitutionally be applied to the defendant, the court below omitted precisely the "case-by-case analysis" contemplated by this Court. The court's failure in this regard is particularly inappropriate because the statute clearly provides defenses for bona fide medical, scientific, educational or cultural purposes, a provision that was not present in the New York statute upheld in Ferber.

6/ "We need not decide whether the Supreme Court would sustain a statute that was carefully directed against the defendant's conduct . . . . " 401 Mass. at 603, 518 N.E.2d at 837; "There is at least a substantial question whether an important governmental interest would warrant overriding First Amendment freedoms in this case . . . . " Id. at 604, 518 N.E.2d at 837; "Even if we

The court's failure to reach the merits of the case is, as a final matter, particularly disturbing in that Oakes' conduct in this case -- his taking of sexually suggestive nude photographs of his fourteen year old stepdaughter in secret -- bears no resemblance to a parent's frontal photograph of a small child "romping in a wading pool," 401 Mass. at 605, 518 N.E.2d at 838, and is conduct which the Commonwealth could properly criminalize.

Footnote continued:

assume that an important governmental interest would justify punishment for the defendant's behavior in this case . . . . " Id., 518 N.E.2d at 837; "[E]ven if what the defendant did in this case could properly be criminalized (a matter we need not decide)." Id. at 605, 518 N.E.2d at 838.

CONCLUSION

For the reasons stated, this petition should be granted. The Court is urged to review and reverse the decision of the Supreme Judicial Court.

Respectfully submitted,

JAMES M. SHANNON*
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

John Pappalardo
Deputy Attorney General
Madelyn Wessel
Assistant Attorney General

One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-4538

*Counsel of Record

DATED: April 1, 1988

APPENDIX A

APPENDIX A

COMMONWEALTH vs. DOUGLAS OAKES

Worcester,

February 3, 1987 - February 1, 1988

Present: Hennessey, C.J., Wilkins, Liacos, Abrams, Nolan, Lynch, & O'Connor, JJ.

Constitutional Law,
Freedom of Speech and Press

A person's conduct in permitting his stepdaughter, age fifteen, to pose, naked above the waste, for photographs he took of her in their home, was, in the circumstances, conduct and speech in the First Amendment sense; the provisions of G.L. c.272, §29A, that rendered such conduct criminal activity were unconstitutionally broad. [616-618] O'CONNOR, J., with whom NOLAN and LYNCH, JJ., joined, dissenting.

INDICTMENT found and returned in the Superior Court Department on January 9, 1985.

A pretrial motion to dismiss was heard by Robert V. Mulkern, J., and the case was tried before John J. Irwin, Jr., J.

SuZanne Worrell (Richard J. Vita with her) for the defendant.

Claudia R. Sullivan, Assistant District Attorney, for the Commonwealth.

WILKINS, J. We sustain the defendant's challenge to the constitutionality of the statute under which he was convicted. A jury found the defendant guilty of violating G.L. c.272, §29A (1986 ed.), which, among other things, makes a crime of knowingly permitting a child under eighteen years of age "to pose or be exhibited in a state of nudity...for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture...."[1/]

1/ General Laws c.272, §29A (1986 ed.), in its entirety reads as follows: "Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.

(footnote continued)

The only evidence that arguably warranted a guilty finding showed that the defendant permitted his fifteen-year old stepdaughter to pose with her breasts exposed for photographs he took of her in their home. His stepdaughter was "in a state of nudity" as defined in

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(footnote continued)

> "It shall be a defense in any prosecution pursuant to this section that such visual representation or reproduction of any posture orexhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library."

Section 29A was amended by St. 1987, c.294, §1. That amendment does not apply to this case and, if it did, it would not change the result.

G.L. c.272, §31 (1986 ed.).[2/] The defendant argues, relying solely on the First Amendment to the Constitution of the United States, that his conduct was protected speech. He finds support for his position in New York v. Ferber, 458 U.S. 747, 764-766 (1982). We need not decide whether the Supreme Court would sustain a statute that was carefully

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2/ General Laws c.272, §32 (1986 ed.), defines "nudity," for the purposes of §29A, as follows: "uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernably turgid state. For purposes of this defination a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area."

directed against the defendant's conduct because we conclude that, in any event, §29A is unconstitutionally overbroad.

We start with a proposition that we would have thought not seriously debatable. Photography is a form of expression which is entitled to First Amendment protection just as the written or spoken word if protected. Photograph as a means of communication and expression can be strikingly informative, as in the works of Mathew Brady and Margaret Bourke-White. It can be inspirationally expressive, as Ansel Adams demonstrated. Although not every picture may be worth a thousand words, in a First Amendment sense a picture is worth at least one.

The defendant's conduct in permitting his stepdaughter to pose naked above the waist cannot fairly be isolated, therefore, for First Amendment purposes, from the expressive process of taking her picture. The circumstances involved at all times both conduct and speech in the First Amendment sense. First Amendment analysis does not severe conduct from speech. To do so would undercut the foundation of First Amendment protections. "A constitutional distinction between speech and conduct is specious. Speech <u>is</u> conduct, and actions speak" (emphasis in original). Henkin, The Supreme Court, 1967 Term -- Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 79 (1968). See <u>Griffin v. State</u>, 396 So. 2d 152, 158 (Fla. 1981) (Sundberg, C.J.,

dissenting in part); L. Tribe, American Constitutional Law §212-7, at 827 (2d ed. 1988); Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1494-1496 (1975).

In cases involving both "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitation on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968) (conviction of draft card burner upheld). See United States v. Albertini, 472 U.S. 675, 687-689 (1985). There is at least a substantial question whether an important governmental interest would warrant overriding First Amendment freedoms in this case. In their own home, the defendant took nonpornographic, nonobscene photographs of his fifteen-year-old, consenting stepdaughter who was nude above the waist, in circumstances where no commercial or even noncommercial distribution was intended or occurred.

Even if we assume that an important governmental interest would justify punishment for the defendant's behavior in this case, the defendant is correct in arguing that §29A is overbroad in its reach and that the overbreadth is substantial enough to warrant striking down §29A. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but

substantial a well, judged in relation to the statute's plainly legitimate sweep"). Cf. New York v. Ferber, 458 U.S. 747, 773-774 (1982) (overbreadth insubstantial). The overbreadth of §29A is substantial. It criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool.[3/] Surely the First Amendment protects that kind of activity, even if what the defendant did in this case could properly be criminalized (a matter we need not decide).

3/ The artists who painted some of the world's greatest paintings engaged in behavior made unlawful under § 29A if they used child models.

The judgment is reversed and the verdict set aside. The indictment is to be dismissed.

So ordered.

O'CONNOR, J. (dissenting, with whom Nolan and Lynch, JJ., join). The court's analysis "start[s] with a proposition that [the court] would have thought not seriously debatable," namely, that photography is a form of constitutionally protected expression. I intend to address that proposition, but first I feel compelled to focus on a different proposition, a proposition that I would have thought not seriously debatable. That proposition, apparently questioned by the court, is that the State's legitimate interest in protecting children from exploitation extends to the type of exploitation that statutes, such as G.L. c.272, §29A, are designed to prevent.

In order that the State's interest may be better appreciated, the court's summary statement of the facts of this case needs fleshing out. The photographs, for which the defendant solicited, caused, encouraged, or permitted the minor victim to pose, are sexually provocative photographs of the type frequently found in magazines displayed by storekeepers in sealed cellophane wrappers. It is immaterial that they are not "obscene" within the Supreme Court's definition of that word. New York v. Ferber, 458 U.S. 747, 756 (1982). It is also immaterial whether they are characterized as pornographic or nonpornographic. Nothing turns on labels. It is only important that these sexually provocative, close-up, color

photographs portray a physically mature minor female in various positions atop a bar, clad only in a red scarf around her neck and bikini type white panties, and with her breasts exposed -- if not highlighted.

It matters not that the child "consented." I would have thought that proposition not seriously debatable.[1/] Nor does it matter that no commercial or even noncommercial distribution was intended, or that the defendant's motive in causing or "permitting" the child to pose for him bare breasted may have been gratification unrelated to money. In any event, the defendant's conduct, criminalized by G.L. c.272, §29A, constituted the abuse, exploitation, and degradation of a child. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance...The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child." New York v. Ferber, supra at 757-758 & n.9.

The only real question in this case is whether soliciting, causing, encouraging, or permitting a child to pose nude (within the definition of nudity in G.L. c.272, §31) is a form of speech calling for First Amendment

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1/ The trial judge, at the time of sentencing, put it this way: "To suggest that a 15 year old girl can logically and intellectually submit herself for that kind of photography by her stepfather, is to me -- is to me an insult to anybody's intelligence."

analysis. More specifically, the question is whether the possible overbreadth of the statute is a relevant consideration in the decision of this case. The question of overbreadth is irrelevant if soliciting, causing, encouraging, or permitting a child to pose for photographs is not "speech" within the context of the First Amendment. New York v. Ferber, supra at 767-768. Broadrick v. Oklahoma, 413 U.S. 601, 610-612 (1973). Of course, the resolution of the question whether the prohibited conduct is also speech cannot properly be influenced by one's enthusiasm or lack of enthusiasm about the public interest involved.

Indeed, pictures, when displayed or disseminated, talk. It does not follow, however, that soliciting, causing, encouraging, or permitting someone to pose for a photograph is itself speech or is so inextricably bound up with the display or dissemination of a photograph that, for constitutional purposes, it must be treated as speech. As the court emphasizes, "no commercial or even noncommercial distribution was intended or occurred" in this case. The photographs were not designed to communicate, and the statute, focusing entirely on the adverse effect on the child of posing for nude photographs, irrespective of whether the photographs are ever shown to anybody, is entirely

neutral with respect to communication.[2/] The conduct proscribed by §29A, then, is only conduct, and not speech, and the overbreadth analysis engaged in by the court is inappropriate.

There appears to be no State or Federal decision directly or analogously supporting the court's conclusion that the defendant's conduct is also speech for constitutional purposes. Instead, the court relies on a dissenting opinion of the chief justice of the Supreme

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2/ It would make no difference if the defendant had taken the photographs for the purpose of disseminating them. A distinction must be made between the dissemination of a photograph, which ordinarily is speech, and the preliminary conduct involved in setting up the photograph. Causing someone to pose is no more speech then other required preliminaries such as manufacturing the film or the camera.

Court of Florida, on two law review articles, and on a treatise. The reliance on the law review articles and the treatise is misplaced. Professor Henkin, in his article, discusses United States v. O'Brien, 391 U.S. 367 (1968), a case in which the defendant burned his draft card to urge others to do the same thing. Henkin criticized the Supreme Court's pronouncemnt that "some kinds of conduct used to express an idea...are 'speech' protected by the first amendment, while others are not" (emphasis added). Henkin, The Supreme Court, 1967 Term -- Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 77 (1968). Henkin expressed his view that all kinds of conduct used to express an idea are speech. He directed his attention to picketing as well as draft card burning,

observing that "[i]n picketing...it is not solely or primarily the words that communicate; the presence of the pickets is itself a communication, and indeed picketing is often effective regardless of what the placards say, because even persons who never read the placards are reluctant to cross a picket line. And what would the Court make of silent pickets who carry no signs but whose presence effectively communicates a message?" Id. at 79.

It was in the context of discussing conduct that directly, immediately, and standing alone conveys a message, and is intended to do so, that Henkin wrote the sentences that the court quotes, ante at 617: "A constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak"

(emphasis in original). In context, it is clear that Henkin's point was that there is no valid constitutional distinction between the articulation of words and other conduct used to express an idea. As Henkin wrote, "[T]he meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. It if is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is 'speech.'" Id. at 79-80. Burning a draft card to express displeasure with government conduct or policy and picketing constitute conduct that speaks. However, soliciting, causing, encouraging, or permitting a child to

pose nude is not intended as expression; it does not communicate; it is not "a common comprehensible form of expression." Nothing in Henkin's article even remotely suggests that all conduct should be viewed as speech or that the type of conduct involved in this case is speech.

Similarly the other law review article cited by the court, Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1494-1496 (1975), provides no support for the court's position. As is apparent from the title of the article, the author's focus was on desecration of the American flag as a symbolic means of political protest. The article is about conduct used to express an idea. At least by implication, Professor Ely's article states the proposition that the type of conduct involved in this case, which by itself expresses no idea, should be considered pure conduct for purposes of constitutional analysis.

Professor Tribe's treatise, American Constitutional Law §12-7, at 825-832 (2d ed. 1988), should give the court no more comfort than do the law review articles. He, too, focuses on cases involving picketing and civil rights demonstrations and other forms of "nonverbal symbolic expression." Id. at 826. He observes that "[e]xpression and conduct, message and medium, are thus inextricably tied together in all communicative behavior; expressive behavior is '100% action and 100% expression'" (emphasis added). Id. at

827. Nothing in Tribe's treatise suggests that the defendant's conduct was communicative or expressive so as to permit an overbreadth argument, and treating it as such results in an unprecedented and inappropriate expansion of the overbreadth doctrine.[3/]

3/ "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . . . What has come to be know as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by 'weighty contervailing policies.' United States v. Raines, [362 U.S. 17, 22-23 (1960)]. The doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of appliction to protected expression.' Schaumburg v. Citizens for

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Although there are no decisions supporting the court's view, there are decisions supporting my view. In State v. Helgoth, 691 S.W.2d 281 (en banc) (Mo. 1985), the defendant took posed photographs of a girl under seventeen, focused on her uncovered breasts and vagina. The pertinent statute made it unlawful to photograph a child under seventeen engaging in nudity, "if such nudity is to be dipicted for the purpose of sexual stimulation or gratification

of any individual who may view such

(footnote continued)

a Better Environment, 444 U.S. 620, 634 (1980); Gooding v. Wilson, [405 U.S. 518, 521 (1972)]." (Citations omitted). New York v. Ferber, supra at 767-769.

depiction." Id. at 283. The court concluded that "the activity engaged in by the defendant and prohibited by the statute is distinctly conduct, as contrasted with speech. The offensive act is grounded in child abuse, and that is the epicenter of the case. The specific distinction to be made is between the use of children in the actual production of pornographic material and the ultimate dissemination of matrerials so produced." Id. at 284.

In Griffin v. State, 396 So. 2d 152, 155-156 (Fla. 1981), the defendant was charged with producing or directing obscene photos involving a minor and with procuring a minor for obscene photos, in violation of statue. The defendant's motion to dismiss attacking the constitutionality of the statute was denied, and the defendant appealed. The court affirmed (with Sundberg, C.J., dissenting), reasoning that "the statute in question does not proscribe constitutionally protected speech or activities, but prohibits specific conduct relating to minors. '[S]tates have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior.'" Id. at 155, quoting Miller v. California, 413 U.S. 15, 26 (1973).

General Laws c.272, §29A, regulates conduct that is not speech. Soliciting, causing, encouraging, or permittng a minor to pose for photographs is no more speech than is setting a house afire in order to photograph a burning house.

Therefore, even if it were necessary to construe §29A as making "a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool," a doubtful proposition asserted by the court, the overbreadth of the statute is irrelevant. As applied to the defendant, the statute bears a reasonable relation to a permissible legislative objective, and it is constitutional. 4/

4/ General Laws c.272, §29A (1986 ed.), provides that "[w]hoever . . . hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits [a] child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished . . . " (emphasis added). Even if overbreadth were an appropriate

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consideration and the statute were overbroad, the overbreadth relates only to that portion of the statute focusing on the causing or permitting of a child to pose in a state of nudity. The emphasized portion of the statute is certainly not overbroad, and the statute is clearly severable. Thus, in no event should the whole statute be ruled unconstitutional. The court's opinion fails to address this issue.